IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 9/1998

The New India Assurance Co. Ltd.,
a registered company, having their
Divisional Office at Velho Bldg.,
3rd Floor, Panaji, Goa. ..... Appellant.

V/s.

1. M/s. Casa J.D. Fernandes ,
   a registered partnership firm having
   its registered office near Municipal Garden,
   Panaji, Goa.

2. Bank of India,
   having their Branch Office at
   Dempo House, Campal, Panaji, Goa. ..... Respondents.

Mr. Eurico Afonso, Advocate for the appellant.

Mr. J.P. Mulgaonkar, Advocate for respondent No.1.

CORAM : B.H. MARLAPALLE, J.

DATE : OCTOBER 07, 2004.

ORAL JUDGMENT :

This appeal arises from the Decree passed by the learned Civil Judge, Sr. Division, at Panaji in Special Civil Suit No. 138/86, wherein the present appellant was impleaded as defendant No.1 and by the said Decree, the appellant was directed to pay to defendant No.2 Bank, on

behalf of the plaintiff an amount of Rs.1,56,932-06, with interest at the rate of 18 % per annum, from 25.4.1986 till full payment, with costs.

2 The plaintiff's case was that it was a partnership business, engaged in sale of stationery and other printing materials and it had drawn a fire insurance policy with defendant No.1, which was valid from 28.6.1984 to 28.6.1985 with sum insured of Rs.5,00,000/- in respect of the value of papers, printing materials, note-books, visiting cards, etc. and lying or stored in the insured's shop at First Class Construction, situated near Municipal Garden, Panaji. The said stocks were hypothecated in favour of defendant No.2. There was a fire that had taken place and some materials insured were gutted. By its letter dated 20.8.1984, the plaintiff informed defendant No.1 that the property insured under Policy No.1224500550 was caught and gutted in fire completely on 1.8.1984. The claim was submitted to the Insurance Company and in the normal process it deputed its Surveyor who visited the premises on 29.9.1984. He submitted his report on 2.2.1985 and stated that on 1.8.1984 there was no fire and incidents of fire had not taken place in the ground floor shop of the plaintiff and located near the Municipal Garden. However, the Surveyor noted that on 18.8.1984, fire had taken place at about 2 p.m. due to short-circuit in the insured's shop premises situated on the first floor, near Municipal Garden and the items, as per list attached to the report dated 2.2.1985 amounting to Rs.1,56,932.06 only were burnt. The Surveyor listed in all 47 items and

stated that they were 50 % under insurance and hence, after applying the average clause, the cost worked out to half of the assessed amount i.e. Rs.63,750/- , if approved. However, by its communication dated 27.3.1985, defendant No.1 turned down the claim for the following reasons “From the above referred Reports, it is observed that the shop insured by us was not involved in the fire. Since we had covered stocks of stationery and such other stocks stored and/or lying in the shop and there was no fire in the shop, we regret our inability to entertain your claim.”

3. Being left with no alternative, the claimant filed Special Civil Suit No.138/1986. It examined PW.1 Joao Fernandes, PW.2 Albert Borges, and PW.3 Gustavo Fernande's. Whereas, defendant No.1 Insurance company examined DW.1 Anthony D'Souza, Asst. Manager, in its Division Office, DW.2 Vinay Kumar Usgaonkar, Surveyor and Assessor and DW.3 S.L. Pednekar, who was at the relevant time working at Goa Fire Service Station, Panaji. The evidence of both the parties as placed before the trial Court did show that there was no incident of fire on 1.8.1984 as contended by the plaintiff, but the incident of fire had taken place on 18.8.1984. The rejection of the plaintiff's claim, as communicated vide letter dated 27.3.1985 (Exhibit P-6), did not indicate that the claim was rejected on these grounds, namely that there was no incident of fire on 1.8.1984. The claim was rejected for the sole reason that the shop insured by defendant No.1 was not involved in the fire and

the stocks of stationery covered by the insurance policy lying in the shop were not gutted in the fire, as there was no indent of fire in the ground floor shop.

4. The Insurance Policy (Exhibit-14) described the insured stocks as under :

> "On stocks of papers, printing matters, note books, visiting cards, cardboards, inks, stationery, furnitures and other stationery belonging to the insured lying and/or stored in the insured' s shop of First Class Construction situated near Municipal Garden, Panaji, Goa and declared for the purpose of this insurance at Rs.5,00,000/- only"

It is thus manifest from this policy that the insurance cover was for the stocks located in the insured's shop of First Class Construction, situated near the Municipal Garden, Panaji and it did not show that the shop was located either on the ground floor or the first floor.

5. The evidence of PW.2, PW.3, DW.2 and DW3 undoubtedly proved that the incident of fire had taken place on 18.8.1984 in the premises of the plaintiff, located at the first floor of the building near the Municipal Garden and the stocks as listed by the Surveyor (DW.2) in his report dated 2.2.1985 and brought on record as Exhibit DW.2/A, were damaged. The loss estimated by the Surveyor deputed by defendant No.1 itself came to Rs.1,27,500/- . The damage of stationery has also been verified by DW.3, who had rushed to the spot on 18.8.1984, on receiving

the telephonic intimation regarding the occurrence of fire. Defendant No.1 was not justified in rejecting the claim on the grounds that the shop, in which the incident of fire had occurred, was not covered by the policy, when no such specific shop was covered by the policy. On the other hand, the policy covered the stocks. The location of the shop at First Class Construction was not identified as first floor or ground floor and instead, it was the shop "situated near Municipal Garden, Panaji, Goa".

6. Nevertheless, the trial Court's assumption that defendant No.1 Company was liable to pay Rs.1,56,932.06, finds no justification, nor there is any reasoning set out in support of the quantification of the said amount. DW.2, the Surveyor, had quantified the claim reimbursable, if approved, at Rs.63,750/- under the said policy. Obviously, this evidence which is very material, was not considered by the trial Court. The claim of the plaintiff was required to be upheld only to the extent of Rs.63,750/- , plus interest at the rate of 18 %.

7. Thought the plaintiff had submitted the claim on the ground that the incident of fire had occurred on 1.8.1984, the fact remains that the said claim was intimated for the first time to the insurance company on 20.8.1984 and the evidence on record has proved that the incident of fire had occurred on 18.8.1984 i.e. before the plaintiff raised the claim. The error of the claimant regarding the exact date of the incident of fire

could not be the sole reason to defeat its claim so long as it had the valid policy, issued by defendant No.1 and the stocks covered by the said policy were damaged either partly or fully.

8. In the result, this appeal succeeds partly. The decree drawn by the learned Civil Judge, Sr. Division, Panaji in Special Civil Suit No.138/1986 is modified and it is held that defendant No.1 is liable to pay an amount of Rs.63,750/- to defendant No.2 on behalf of the plaintiff, with interest at the rate of 18 % per annum from 25.4.1986 till full payment, with costs. Registry to issue a fresh decree accordingly. The deposit amount shall be distributed as per this decree to the respective parties.

B.H. MARLAPALLE, J.

ssm.